Supreme Court, U.S.
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No. 96-1111

In The

Supreme Court of the United States

October Term, 1996

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,

Petitioners,

v.

VICTOR CARPENTER, ALLEN BENNETT, JAMES LOWDER, RICHARD SPEAR, ALBERT C. WALKER, RONALD Y. NAKASONE, MOLLEEN MATSUMURA, AND MICHAEL BAUMAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Respondents' Brief in Opposition to Writ of Certiorari is more notable for what it does not say than for what it does say. In arguing that this Court rarely disturbs a Court of Appeal's determination of state law, Respondents never dispute the central point made by the Petition for Writ of Certiorari: an important question of federal law is presented when a Court of Appeals abandons state court precedent and federalizes the interpretation of a state's constitution.

Respondents acknowledge that the Ninth Circuit has developed its own "framework" for analyzing the California Constitution's No Preference Clause, but claim that this "framework" derives from California precedents. (Opp. at p. 10, citing *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2707 (1994).) As the Petition emphasized, however, California precedents call for a contextual inquiry involving two questions: (1) whether government has communicated a message of promoting or approving religion, and (2) whether the object at issue has non-religious significance. (Pet. at pp. 6, 8, citing *Fox v. City of Los Angeles*, 22 Cal.3d 792, 795 (1978); *Okrand v. City of Los Angeles*, 207 Cal.App.3d 566, 579-580 (1989).)

Critically, the Opposition Brief does not even assert that the Ninth Circuit's application of its "framework" to this case takes account of the first of these inquiries. Indeed, Respondents themselves make no effort to demonstrate that the City's ownership of the 60-year-old Mt. Davidson Cross – shrouded as it is by tall trees in a park

far removed from the seat of government – conveys to the reasonable observer a message that the City has promoted Christianity.[1]

As to the second inquiry, Respondents, like the Ninth Circuit, limit themselves to discussing a cross' religious symbolism, and to challenging the District Court's factual findings that the structure has historic, cultural, and artistic significance. As a practical matter, the Ninth Circuit's failure to look beyond the spiritual content of a Latin cross, irrespective of the structure's secular significance and the absence of any governmental promotion, is what turns the lower court's decision away from California law and into a *per se* rule.

In sum, the Ninth Circuit has federalized the interpretation of California's No Preference Clause in a way that violates its central premise. As a result, the court has invalidated under the California Constitution what California's courts would have upheld. Unmoored from its anchor in California law, the Ninth Circuit's decision effectively stands as an insular body of Federal law beyond the reach of the California courts.

Certiorari should be granted to right this important breach of the principles of federalism.

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[1] As the District Court stated: "It appears ironic that San Francisco, which not only tolerates but appears to embrace literally almost any activity, conduct or philosophy, . . . would somehow be deemed to be making law establishing or preferring any particular religion." *Carpenter v. City and County of San Francisco*, 803 F.Supp. 337, 352 (1992).

Dated: February 24, 1997

Respectfully submitted,

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